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Nos. 00-596 and 00-597

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Lorillard Tobacco Company; Brown & Williamson Tobacco Corporation; R.J. Reynolds Tobacco Company; Philip Morris Incorporated; and U.S. Smokeless Tobacco Company,

Petitioners,

- and -

Altadis U.S.A. Inc., As Successor To Consolidated Cigar Corporation and Havatampa, Inc.; General Cigar Co., Inc.; John Middleton, Inc.; Lane Limited, As Successor To Tobacco Exporters International (USA) Ltd.; L.J. Peretti Co., Inc.; Swedish Match North America, Inc.; and Swisher International, Inc.,

Petitioners,

v.

Thomas F. Reilly, Attorney General
of the Commonwealth of Massachusetts,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER U.S. SMOKELESS TOBACCO COMPANY

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's Rule 29.6 Statement was set forth at page *ii* of its Brief on the Merits, and there are no amendments to that Statement.

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INTRODUCTION

With respect to U.S. Smokeless Tobacco Company ("USSTC") — the only Petitioner challenging the regulations specifically with respect to smokeless tobacco — the Massachusetts Attorney General's brief is more interesting for the issues it avoids than for the points it raises.[1] It avoids substantive discussion of the arguments raised by USSTC; it avoids responding to the deficiencies in the Attorney General's token smokeless tobacco submission detailed by USSTC; and it avoids the simple truth that, as to USSTC, the Attorney General's showing falls far short of the mark set by this Court in matters of speech regulation. Indeed, the level of generality present throughout the Attorney General's brief — as reflected in his repeated use of the term tobacco, as opposed to addressing, with few exceptions, smokeless tobacco — demonstrates further his failure to respond to USSTC's arguments.

1. The Attorney General makes no real effort to respond to USSTC's argument that his token smokeless tobacco submission is patently inadequate as a justification for the abridgement of USSTC's rights under the First Amendment, especially against the backdrop of a "steady and significant decline" in underage smokeless tobacco consumption. Instead, he asserts in a footnote that the non-cigarette Petitioners — which include USSTC — "argue that they should be exempt from Massachusetts' regulation of tobacco advertising." Brief For Respondent ("Resp. Br.") 40 n.21. This is a strawman, for USSTC seeks no such exemption. Rather, it seeks to invalidate the regulations on the grounds that they are unconstitutional content and viewpoint-based restrictions on truthful and nonmisleading speech.

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1. As with its opening Brief, USSTC also relies on the Reply Brief submitted by the Cigarette Petitioners and has limited its presentation here accordingly.

2. This case is not about whether Massachusetts has asserted a substantial interest. It has, and USSTC agrees that reducing underage consumption of smokeless tobacco is an important and shared goal. In our system, however, the question is not solely whether the goal is desirable, but also — and more importantly — whether the *method* chosen to bring about the desired result is permitted by the Constitution. In matters of free speech, it is most often the case, as USSTC submits it is here, that the end does not justify the means. "[W]hatever the legitimate public interest in this area, proper analysis requires us to scrutinize the precise means employed to implement that interest." *Buckley v. Valeo*, 424 U.S. 1, 238 (1976) (Burger, C.J., concurring in part and dissenting in part). Even when it allows for restrictions on speech, the First Amendment requires that government use a scalpel. The Attorney General has used an axe.

3. That others, including *amici*, may share the Attorney General's views about tobacco and advertising lends no assistance to his censorship. As USSTC noted in its opening Brief, the vilification of tobacco companies should herald a call for more protection, not less. Brief For Petitioner U.S. Smokeless Tobacco Company ("USSTC Br.") 15. "The First Amendment protects expression, be it of the popular variety or not. And the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view." *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2457 (2000) (citations omitted).

The Attorney General's virtual failure to address USSTC and smokeless tobacco speaks volumes about whether he can

meet his constitutional burden of justifying the regulations as to *smokeless tobacco*, under either strict scrutiny or *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). And with respect to the points the Attorney General does make, not one provides genuine support for the blunderbuss regulations with respect to *smokeless tobacco*.[2]

ARGUMENT

THE REGULATIONS CANNOT PASS CONSTITUTIONAL MUSTER WITH RESPECT TO SMOKELESS TOBACCO.

A. The Attorney General Cannot Rely On His Cigarette Submission To Ban Smokeless Tobacco Advertising.

Failing to field any meaningful defense to USSTC's argument that his token smokeless tobacco submission is fatally inadequate, the Attorney General instead implicitly

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2. The Attorney General's contention that USSTC is not asserting a preemption claim is flatly incorrect. Resp. Br. 16 n.7. Rather, as set forth in its opening Brief, USSTC submits that if the regulations are preempted by Section 5 of the Federal Cigarette Labeling and Advertising Act, as amended, 15 U.S.C. § 1334 (the "FCLAA"), as to cigarettes, then they also should be preempted by the FCLAA with respect to smokeless tobacco on the grounds that the regulations cannot be severed in their application between the two. USSTC Br. 4 n.5; *see also* Pet. 7 n.6.

In addition, the Attorney General states that this case presents only a facial challenge to the regulations. Resp. Br. 46. However, USSTC's challenge to the regulations is both facial and as applied to USSTC's advertisements. *See* Plaintiff's (USSTC's) Memorandum of Law in Opposition to Motion for Partial Summary Judgment (First Amendment Claims) at 11-12 & n.12 (D. Mass.) (No. 99-11118-WGY).

acknowledges that he is relying on his purported findings as to cigarettes to justify regulating smokeless tobacco advertising. In the Attorney General's words, "[i]t would . . . be *irrationally inconsistent* for Massachusetts to restrict cigarette advertising, but not the advertising for other hazardous tobacco products that are also illegal for sale to minors." Resp. Br. 40 n.21 (emphasis added).[3] Whatever the Attorney General may mean by "*irrationally inconsistent*," this incantation cannot insulate the regulations from USSTC's constitutional challenge as to smokeless tobacco.

To the extent the Attorney General's argument is that he can engage in "regulation by association," it cannot survive First Amendment scrutiny, particularly when, as is the case here, the record demonstrates that the products differ materially with regard to the very issues that are fundamental to the First Amendment inquiry. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963); USSTC Br. 19 (citing, *inter alia*, the fact that while cigarette smoking by minors increased, smokeless tobacco consumption has "declined steadily" and "significantly"). " 'Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so

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3. The Attorney General cites *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995), in support of his theory that if cigarette advertising is censored, smokeless tobacco advertising likewise must be censored. Resp. Br. 40 n.21. But *Rubin* did not hold that studies and submissions regarding the advertising of one product may be used to support a ban on advertising an entirely different product, particularly when, as is the case here, the record evidence establishes a lack of parity between the products in respects that are critical to the First Amendment inquiry.

closely touching our most precious freedoms.' " *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (quoting *Button*, 371 U.S. at 438).

Thus, it is no answer to USSTC's First Amendment challenge that smokeless tobacco advertising must be suppressed simply because cigarette advertising is suppressed.

B. Strict Scrutiny Applies To The Regulations.

As set forth in USSTC's opening Brief, strict scrutiny is the appropriate standard for analyzing the regulations. USSTC Br. 9-15.

1. Denominating The Regulations As "Locational Restrictions" Does Not Insulate Them From Strict Scrutiny.

The Attorney General argues that the regulations are mere "locational restrictions" on tobacco advertising that should receive only intermediate scrutiny, as is the case with time, place or manner and zoning restrictions. Resp. Br. 15. This assertion, however, crumbles quickly under the weight of a fundamental First Amendment rule: only those restrictions that are *content-neutral* may properly be considered time, place or manner restrictions. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys .... Government regulation of

> expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech."

Id. (alteration in original) (citations omitted) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

There can be no legitimate dispute that the predicate for the Attorney General's "lessened scrutiny" argument is absent because the regulations are not content-neutral. As the Court of Appeals held, the regulations are "plainly content-based." Pet. App. 14a. Indeed, in the very brief in which he argues for the application of a standard that applies to content-neutral regulations, the Attorney General concedes that the regulations restrict speech based on its content. *See, e.g.*, Resp. Br. 31 n. 15 ("Massachusetts regulations . . . make both an appropriate content distinction and restrict only the 'place' of advertising"); *id.* at 31 ("a law focused on the advertising of a specific product — here, tobacco — can be characterized as 'content-based' ").

For the same reason, the Attorney General's reliance on zoning cases, such as *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986), is misplaced, as made clear by this Court's decision last term in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

> Our zoning cases, on the other hand, are irrelevant to the question here. We have made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of

> protected speech. The statute now before us burdens speech because of its content; it must receive strict scrutiny.

Playboy Entm't, 529 U.S. at 815 (citations omitted). Because the regulations are plainly content-based, and directed at the alleged primary effects of smokeless tobacco advertising, they cannot be analyzed under either a time, place or manner or zoning standard.

2. The State's Legitimate Interest In Protecting Minors Does Not Create A Constitutional Exemption For The Suppression Of Protected Speech Directed To Adults.

The Attorney General states that the regulations are permissibly content-based because they are designed to protect minors. Resp. Br. 31. His attempt to justify the regulations on this basis, however, runs afoul of this Court's repeated holdings that an interest in protecting minors does not create an exemption from the strictures of the First Amendment. *E.g., Playboy Entm't*, 529 U.S. at 811-15; *see also* USSTC Br. 11. "And if the constitutional guarantee is not to be trivialized, it must mean that government cannot justify restrictions on free expression by reference to the adverse consequences of allowing certain ideas or information to enter the realm of discussion and awareness." Laurence H. Tribe, *American Constitutional Law* § 12-2, at 790 (2d ed. 1988).

3. The Regulations Are Not Viewpoint-Neutral.

As set forth in USSTC's Brief, the regulations ban speech that promotes smokeless tobacco brands to adult consumers, but permit the Commonwealth to utter its anti-tobacco messages

at will. USSTC Br. 13-15. This is the essence of viewpoint discrimination. *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional."). "[I]f the constitutional guarantee means anything, it means that, ordinarily at least, 'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . .' ." Tribe, *supra*, § 12-2, at 790 (quoting *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972)).

The Attorney General argues that the regulations do not restrict viewpoint, and should receive intermediate scrutiny, because "Massachusetts has a neutral basis for its regulation (support of its tobacco sales law), which forecloses any argument that 'official suppression of ideas is afoot.' " Resp. Br. 33. This claim of viewpoint neutrality simply cannot be reconciled with the regulations. For example, they suppress USSTC's particular viewpoint that its smokeless tobacco products are for sale to adults only, as captured in the following message included in all of USSTC's advertisements: "U.S. Tobacco Reminds You – Smokeless Tobacco – Not For Sale To Minors." Cir. JA 3756-62. Thus, even though USSTC's advertising expressly *supports* Massachusetts' prohibition on smokeless tobacco sales to minors, it is nonetheless effectively censored by the regulations. This demonstrates that the Attorney General is attempting to silence *USSTC*, an effort that clearly violates the First Amendment. *Playboy Entm't*, 529 U.S. at 812 ("Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles."); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 194 (1999) ("[D]ecisions that select among speakers conveying virtually

identical messages are in serious tension with the principles undergirding the First Amendment.").[4]

4. The Blunderbuss Approach Taken By The Attorney General Demonstrates The Need For Strict Scrutiny.

The ease with which the Attorney General attempts to sweep aside USSTC's speech, without making any real showing — or even acknowledging the need for one — is a reminder both of the temptation of government officials to try to silence those with whom they disagree, and the need for courts to strictly scrutinize such efforts. USSTC Br. 10-11. The words of Justice Holmes ring true here, and counsel the application of strict scrutiny to such attempts at censorship. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.").[5]

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4. USSTC's inclusion in its advertising of this viewpoint on a matter of public concern does not affect its constitutionally-protected status. "[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." *Buckley*, 424 U.S. at 16.

5. The indiscriminate nature of the Attorney General's approach is highlighted by his labeling of all tobacco advertisements covered by the regulations as "unfair or deceptive." 940 C.M.R. § 21.04(5). Such labeling avoids the "precision of regulation" required by the First Amendment. *See supra*, section A; *see, e.g.*, *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 621-22 (1996) ("An agency's simply calling an independent expenditure a 'coordinated expenditure' cannot

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For the reasons set forth herein, and in USSTC's opening Brief, strict scrutiny should be applied, and the regulations should be invalidated.

C. The Regulations Fail To Meet The *Central Hudson* Standard.

USSTC submits that even if *Central Hudson* is the appropriate standard, the regulations fail as to smokeless tobacco. USSTC Br. 16-25. Nothing in the Attorney General's brief or his Lodging alters, or even meaningfully addresses, this conclusion.

1. The Attorney General's Lodging Does Not Resuscitate The Regulations With Respect To Smokeless Tobacco.

As an initial matter, the fact that the Attorney General believed it necessary to lodge extra-record materials with the Court, and cite them in his brief, only highlights the

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(for constitutional purposes) make it one."); *Button*, 371 U.S. at 429 (government "cannot foreclose the exercise of constitutional rights by mere labels"); *Edwards v. South Carolina*, 372 U.S. 229, 235-38 (1963) (state may not avoid First Amendment's strictures by applying the label "breach of the peace" to peaceful demonstrations).

In any event, notwithstanding his protestation to the contrary (Resp. Br. 35 n.17), the Attorney General very clearly conceded below, for purposes of summary judgment, the truthful and nonmisleading nature of USSTC's speech concerning a lawful activity (Pet. App. 17a), and maintained that whether USSTC's advertisements are unfair or deceptive is not relevant to the subject matter of this litigation (Cir. JA 549-52).

inadequacy of the record as to smokeless tobacco.[6] Indeed, the Attorney General barely mentions smokeless tobacco in his brief, and when he does he relies as much on his Lodging as on the record below. Even if this Court decides that such extra-record materials were properly placed before it, the materials do not bolster the record as to *smokeless tobacco*.

2. The Attorney General Continues To Ignore The Numerous Alternatives To The Regulations Proposed By USSTC.

Incredibly, the Attorney General argues that there is no alternative to prohibiting the display of tobacco advertising, Resp. Br. 49, and that the only alternative measure to the regulations offered by the Petitioners is criminalization of underage tobacco use. Resp. Br. 48 n.28. Once again, he

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6. While USSTC does not concede that the Lodging is appropriate, it relates, like the Attorney General's submission below, primarily to cigarettes. As to smokeless tobacco, the Lodging contains excerpts of the 2000 Surgeon General report, which includes an allegation that smokeless tobacco usage trends in the 1970s and early 1980s can be attributed to purported marketing activities. Lodging of the Respondent ("Ldg.") 5-6. This is the same allegation that the Attorney General raised below, relying on certain conclusory statements made by the Food and Drug Administration in 1996 in connection with its vacated rule concerning tobacco products. USSTC Br. 21. As USSTC stated in its opening Brief, this allegation relates to purported decades-old marketing from (according to the Attorney General) the late 1960s (Resp. Br. 39 n.19), and is irrelevant to this case. USSTC Br. 21-22 & n.17. In addition, elsewhere in the 2000 Surgeon General report, in a portion the Attorney General chose not to excerpt for the Court in his Lodging, these alleged smokeless tobacco usage trends were attributed at least in part to excise tax differentials that existed at the time. *Reducing Tobacco Use, A Report of the Surgeon General* 336 (2000).

ignores USSTC's arguments. In its opening Brief, USSTC cited numerous available alternatives to the regulations, including a statewide licensing scheme, which the Attorney General's own 1994 survey concluded could "drastically reduce the sale of tobacco products to minors"; electronic age verification, as implemented by several other states; and case by case enforcement actions directed at advertising that is actually unfair or deceptive pursuant to the Attorney General's existing authority under Massachusetts General Laws chapter 93A, section 4. USSTC Br. 23-24.[7]

With respect to smokeless tobacco, the regulations do not directly and materially advance the asserted government interest and, as USSTC's proposed alternatives demonstrate, the regulations are far more extensive than necessary.

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7. The Attorney General briefly argues that self-service displays are not protected by the First Amendment. Resp. Br. 47 n.26. Such displays, however, declare the availability and freshness of USSTC's brands for a particular price and propose a transaction with the adult consumer, entitling them to protection. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 700 (1977) ("the prohibition of any 'advertisement or *display*' of contraceptives is unconstitutional") (emphasis added). Self-service displays allow the price, freshness, or brand-conscious consumer to examine the package of each brand available and any price sticker or other information (such as freshness date) affixed to such package. USSTC Br. 6 n.6.

CONCLUSION

For the foregoing reasons, and those set forth in its opening Brief, Petitioner USSTC respectfully requests that this Court reverse the judgment of the Court of Appeals.

Respectfully submitted,

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